

Testimony of
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Are More Judges Always the Answer?

This June the President took the unusual step of staging a Rose Garden announcement highlighting his simultaneous nomination of three individuals to the Court of Appeals for the DC Circuit. The president portrayed the D.C. Circuit as a court in crisis. He suggested that the D.C. Circuit was short-staffed, threatening our ability to maintain a fair and functioning judiciary.

But the numbers tell a different story. They show the D.C. Circuit to be the most underworked court in the country, with a caseload that has dropped significantly over the past decade.

There are many different ways to measure a court's workload, but they all tell the same story in this case. The most relevant statistic, and the one that forms part of the Administrative Office of the Courts' own formula to gauge workload, is the number of annual filings per judge. With its current complement of eight active judges, equally balanced between Republican and Democratic nominees, the D.C. Circuit has the lowest number of new filings per judge of any circuit court. By comparison, the Fifth Circuit has more than three times as many cases filed per judge as does the D.C. Circuit, and the Eleventh Circuit over four times as many.

The number of cases disposed of per judge is another metric by which to gauge workload. Once more, the D.C. Circuit is the court with the lowest numbers. The Eleventh Circuit again has more than four times as many cases disposed of annually per active judge as does the D.C. Circuit. The Second, Fifth, and Ninth Circuits all have more than three times as many cases disposed of annually per active judge.

One can also look at the number of cases disposed of on the merits – a better gauge of the type of cases that are taking up the most time for judges. Using that metric, four other circuits have more than three times as many cases decided on the merits per active judge as does the D.C. Circuit. The Eleventh Circuit, again the workhorse, has nearly five times as many.

Every circuit court has a unique balance of types of cases, and the D.C. Circuit is no exception. Its role in hearing many administrative challenges means it does get more than its fair share of complicated regulatory issues, but that hardly makes up for the heavily skewed absolute numbers of cases. The average administrative law case may take longer to work through than the average criminal case, but not three to five times as long.

Not only is the DC Circuit less busy than its sister courts, it has a low caseload in absolute terms. It officially hears oral arguments in cases between September and May, but for the past several years the court has had to cancel sittings because of a lack of cases.

The D.C. Circuit judges agree. Several provided candid comments in response to questions from Senator Grassley about whether new judges were needed on their court. One even stated that, “If any more judges were added now, there wouldn’t be enough work to go around.”

Others pointed to the significant contribution of senior judges to keeping up with the court’s caseload. The statistics cited previously all presume that only the

eight active judges are carrying the court's caseload, but that is far from accurate. According to the Chief Judge of the D.C. Circuit, the six senior judges who hear oral arguments together carry a workload equivalent to 3.25 active judges. Adding that to the eight active judges, there are the full time equivalents of 11.25 judges serving on the D.C. Circuit currently – more than number of authorized seats on that court. The judges responding to Senator Grassley indicated that those senior judges were fairly young and healthy on average and could be expected to serve for another decade.

On an anecdotal level, my experience clerking at the D.C. Circuit for Judge David Sentelle was consistent with all these statistics. I had friends clerking at other appellate courts across the country, and certainly felt that our workload was light in comparison with theirs.

What's more, the DC Circuit's already-low caseload is actually in decline. Since the 2003-04 term the numbers of cases scheduled for oral argument per active judge has decreased by about 18%. This is remarkable considering the fact that the court currently has only eight active judges, compared to a high of 10 active judges from 2006-08.

The president was correct about one thing in his Rose Garden speech: there are some courts that are truly short-staffed and in crisis. The Administrative Office of the Courts, taking into account the number and types of cases each circuit hears, has identified eight appellate seats that constitute judicial emergencies. But the DC Circuit is nowhere on the list.

The question, then, is: Why did the president choose to make such high-profile nominations to a court that barely has enough work to go around at a time when almost 70% of federal vacancies, including 75% of the “judicial emergencies” had no nominee? There is no neutral principle that explains his move, suggesting that the timing and manner of the three DC Circuit nominations was simply due to politics.

The DC Circuit enjoys a unique role as the court that hears the lion’s share of cases addressing administrative law and regulatory agencies. Its position as a check on government power puts it in the crosshairs of a president whose governing style is characterized by aggressive use of administrative agencies and an avowed desire to “push the envelope” to achieve his goals when he has been stymied by Congress.

Key Democratic Senators have acknowledged this motivation behind the DC Circuit nominations. At a fundraising dinner this March, Sen. Charles Schumer lamented decisions of the court that have enforced legal limits on his preferred political agenda. He criticized cases in which the Court overturned an EPA regulation that lacked statutory authority, found that the SEC was promulgating regulations without performing the required cost-benefit analysis, and insisted that the recess appointment power could only be used when the Senate was officially in recess. In order to roll back the policy results of these decisions, Sen. Schumer vowed that “we will fill up the DC Circuit one way or the other.”

Senator Harry Reid has also pointed to political reasons to move forward on the presidents' nominations to the DC Circuit, complaining the court was "wreaking havoc in the country." He stated, "We're focusing very intently on the DC Circuit. We need at least one more. There's three vacancies, we need at least one more and that will switch the majority."

Our nation is struggling to get its financial house in order, and our judiciary is laboring in many places with a shortage of judges. This is not the time to increase the burdens on taxpayers for a court that doesn't need new judges or to divert scarce resources from where they are needed most. Congress should instead act to shield the American people from the unnecessary financial burden of funding additional judges simply to facilitate the president's aggressive political agenda.